Nos. 18-8027 and 18-8029

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF WYOMING, et al.,
Petitioners - Appellees,

and

WESTERN ENERGY ALLIANCE, et al.,
Consolidated Petitioners - Appellees,

and

STATE OF NORTH DAKOTA, et al.,
Intervenors - Petitioners - Appellees,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
Respondents - Appellees.

and

WYOMING OUTDOOR COUNCIL, et al.,
Intervenors - Respondents - Appellants,

and

STATE OF CALIFORNIA, et al.,
Intervenors - Respondents - Appellants.

On Appeal from the United States District Court for the District of Wyoming
Nos. 2:16-cv-00285-SWS; 2:16-cv-00280-SWS (Hon. Scott W. Skavdahl)

ANSWERING BRIEF OF FEDERAL RESPONDENTS-APPELLEES

ORAL ARGUMENT NOT REQUESTED

JEFFREY H. WOOD
Acting Assistant Attorney General

ERIC GRANT
Deputy Assistant Attorney General

ANDREW C. MERGEN
J. DAVID GUNTER II
SOMMER H. ENGELS
Attorneys
Environment & Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 353-7712
sommer.engels@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES AND REGULATIONS:

OTHER AUTHORITIES:

STATEMENT OF RELATED CASES

The Bureau of Land Management agrees with the Appellants' statement of related cases.

GLOSSARY

2016 Rule	Waste Prevention Rule, 81 Fed. Reg. 83,008 (Nov. 18, 2016).
BLM	Bureau of Land Management
The Groups	The Citizen Groups and States of California and New Mexico
Op. Br.	Opening Brief
The Petitioners	The Industry Groups and States of Wyoming and Montana

INTRODUCTION

This appeal is a challenge to a district court order staying review and full implementation of a Bureau of Land Management (BLM) regulation that will imminently be replaced.

BLM promulgated the Waste Prevention Rule in 2016 (2016 Rule), citing authority granted by the Mineral Leasing Act of 1920, among other statutes. The Rule was a new attempt to regulate the venting and flaring of natural gas during oil and gas extraction on public lands, and it replaced regulations that had been in effect for more than 30 years. The 2016 Rule required operators to undertake costly improvements and included several phase-in periods to give them time to come into compliance. Industry groups and the States of Wyoming and Montana (together, the "Petitioners") promptly challenged the Rule in the District of Wyoming.

While that suit was pending and before the Rule went into full effect, BLM exercised its discretion to reconsider its regulation, and it began to develop a "Revision Rule." In April 2018, the district court issued an order staying review and full implementation of the 2016 Rule. The court reasoned that requiring review and implementation of the 2016 Rule's costliest and most burdensome parts while the agency completed its Revision Rule would impose needless costs on the court, the agency, and the regulated community.

The Citizen Groups and States of New Mexico and California (collectively, "the Groups") assert that the district court abused its discretion. But because the final

Revision Rule is just weeks from publication, their appeal is prudentially moot and should be dismissed. If the Court holds that the district court applied the wrong test, this case should be remanded to the district court for application of the proper test.

JURISDICTIONAL STATEMENT

This district court has jurisdiction over this suit under 28 U.S.C. § 1331 because the claims arise under federal law, namely the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C).

The district court granted the stay at issue on April 4, 2018. ECF No. 215.[1] The Citizen Groups appealed that order on April 5, ECF No. 216, and the States of California and New Mexico appealed on April 6, ECF No. 218, making the appeals timely under Federal Rule of Appellate Procedure 4(a)(1)(B)(ii).

The Industry Groups and States of Wyoming and Montana moved to dismiss the appeals, arguing that the district court's stay order was not appealable under 28 U.S.C. §§ 1291 or 1292(a)(1). This Court denied the motions to dismiss, holding that it has jurisdiction to consider the district court's stay order.

STATEMENT OF THE ISSUES

1. Whether this Court should withhold review because this appeal is prudentially moot.

[1] References to documents filed in the district court are cited "ECF No. #" and refer to District of Wyoming docket number 2:16-cv-285-SWS.

2. If the district court was obligated to consider the four-factor test, whether this case should be remanded to the district court for application of that test in the first instance.

STATEMENT OF THE CASE

A. Promulgation of the 2016 Rule

A variety of federal statutes grant BLM broad discretionary authority to regulate the development of federal and Indian oil and gas resources. *See* 30 U.S.C. §§ 188-287 (Mineral Leasing Act); 43 C.F.R. § 3160.0-3 (listing other statutes). BLM cited that authority when it issued the 2016 Rule. 81 Fed. Reg. 83,008, 83,009 (Nov. 18, 2016). The Rule went into effect on January 17, 2017, *id.* at 83,008, but a number of its requirements were to be phased in over several years, *id.* at 83,023-25. Many of those phase-in provisions required operators to upgrade existing equipment or install new equipment that would not be mandatory but for the 2016 Rule. *Id.*; *see also* 43 C.F.R. §§ 3179.201-203, 3179.301-305.

In November 2016, the Petitioners petitioned for review of the 2016 Rule in the District of Wyoming, arguing that BLM lacked authority to issue the Rule and that it conflicted with federal and state air quality regulations. In January 2017, the district court denied the Petitioners' motions for a preliminary injunction, holding that they had not shown likely success on the merits or that they would suffer irreparable harm. ECF No. 92 at 10-27.

In March 2017, while the petitions were pending, the President issued an Executive Order directing the Secretary of the Interior to review and revise existing regulations that "potentially burden the development or use of domestically produced energy resources." Exec. Order. No. 13,783, § 1(c), 82 Fed. Reg. 16,093 (Mar. 28, 2017). BLM reviewed the 2016 Rule and eventually decided to exercise its inherent authority to revise and replace it. *Cf., e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (acknowledging that agency interpretations are not "carved in stone" and may be re-evaluated, for example, "in response to . . . a change in administrations"). The agency ultimately explained that (1) the 2016 Rule's economic analysis likely relied on unsupported assumptions; (2) its benefits might not justify its costs; (3) its issuance possibly exceeded BLM's statutory authority; and (4) the complexities of the 2016 Rule would likely make it difficult to follow and implement. *See* 83 Fed. Reg. 7924 (Feb. 22, 2018).

B. Section 705 Postponement and the Suspension Rule

In June 2017, BLM published a notice stating that it was exercising its authority under 5 U.S.C. § 705 to postpone future compliance dates for particular phase-in provisions in the 2016 Rule. 82 Fed. Reg. 27,430 (June 15, 2017). The Groups challenged that postponement in the Northern District of California. That court denied requests to transfer the challenges to the District of Wyoming, faulted BLM for failing to engage in notice-and-comment rulemaking before issuing the

postponement, and reinstated the 2016 Rule's future compliance dates. *See California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017).

Shortly thereafter, BLM proposed a "Suspension Rule" that would suspend implementation of the parts of the 2016 Rule that imposed substantial compliance costs, including a number of the provisions already postponed in June 2017. 82 Fed. Reg. 46,458 (Oct. 5, 2017). After notice and comment, BLM published the final Suspension Rule in December 2017. 82 Fed. Reg. 58,050 (Dec. 8, 2017). The Suspension Rule was designed to "avoid imposing temporary or permanent compliance costs on operators for requirements that might be rescinded or significantly revised in the near future." *Id.* at 58,051. That rule took effect on January 8, 2018. *Id.* at 58,050.

Because the provisions of the 2016 Rule at issue in the present action were postponed by the Suspension Rule, the district court stayed the action. ECF No. 189. In December 2017, however, the Groups returned to the Northern District of California to challenge the Suspension Rule. That court once again denied requests to transfer the cases to the District of Wyoming, and it preliminarily enjoined the Suspension Rule on February 22, 2018. *California v. U.S. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054 (N.D. Cal. 2018). BLM filed an amended administrative record in that case on August 27, 2018. N.D. Cal. No. 3:17-cv-7186, ECF No. 117.

C. Revision Rule and Recent Proceedings

On the same day that the Northern District of California enjoined the Suspension Rule, BLM published its proposed Revision Rule in the Federal Register. 83 Fed. Reg. 7924. The proposed rule contemplates rescinding parts of the 2016 Rule that BLM has reason to believe are unduly burdensome, unnecessarily overlap with other regulations, and anticipate benefits that will not exceed their costs. *Id.* at 7928-29. The proposed rule also contemplates modifying many of the remaining requirements of the 2016 Rule to make them more consistent with BLM's previous regulations. *Id.*

Because the injunction issued by the Northern District of California arguably reinstated the full 2016 Rule, the Petitioners moved to lift the stay in the District of Wyoming and for various forms of equitable relief. BLM did not oppose relief that would stay the portions of the 2016 Rule that were suspended by the Suspension Rule and that might be eliminated by the Revision Rule.

On April 4, 2018, the district court stayed implementation of the parts of the 2016 Rule with January 2018 compliance dates as well as the litigation pending in that court until BLM finalizes the Revision Rule. ECF No. 215 at 10. It acknowledged that BLM "has the inherent authority to reconsider its own rule," *id.* at 7, and that forcing "temporary compliance with [the 2016 Rule] makes little sense and provides minimal public benefit," because, at that time, the Revision Rule was scheduled for completion within months, *id.* at 9.

The Groups appealed that order to this Court, which consolidated the appeals. The Groups also moved the district court for a stay pending appeal. ECF No. 222. The court denied that motion, explaining that "[b]ecause the phase-in provisions have never been implemented, [the Groups] are no more harmed by the Court's stay than they have been under the status quo for the last several decades." ECF No. 234 at 7. On June 4, 2018, this Court likewise denied the Groups' motion for a stay pending appeal.

In the meantime, BLM's promulgation of the Revision Rule has proceeded. The agency accepted public comments on the proposed rule until April 23, 2018. *See* ECF No. 239-1 at ¶ 4. On June 19, 2018, BLM submitted the rule to the Office of Information and Regulatory Affairs of the Office of Management and Budget for interagency review pursuant to Executive Order 12,866 (Sept. 30, 1993). *Id.* Since that time, BLM has been in the process of soliciting and incorporating interagency comments. As of filing, BLM anticipates finalizing the Revision Rule before the end of this month. *Id.* ¶ 6.

SUMMARY OF ARGUMENT

Soon this case will be constitutionally moot. The appealed stay order delayed full implementation of a rule that will be superseded in mere weeks. Because an order from this Court will soon cease to have any real-world effect, evaluating the merits of this appeal would be a poor use of resources. Accordingly, these appeals should be dismissed as prudentially moot.

If, however, this Court turns to the merits and holds that the district court should have considered the four factors required for issuance of a preliminary injunction, the proper course is to remand to the district court for consideration of those factors in the first instance.

STANDARD OF REVIEW

The district court's stay of the 2016 Rule is reviewed for abuse of discretion. *Amphibious Partners, LLC v. Redman*, 534 F.3d 1357, 1361 (10th Cir. 2008) (explaining that "we will not reverse the court's decision in equity absent a showing that the court abused its discretion" (internal quotation marks omitted)). A court abuses its discretion when its decision is "arbitrary, capricious, whimsical, or manifestly unreasonable." *Attorney General v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009) (citation omitted). A reviewing court may not disturb the district court's decision unless it has a "definite and firm conviction that the [district] court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Amphibious Partners*, 534 F.3d at 1361 (citation omitted).

ARGUMENT

I. This appeal is prudentially moot and should be dismissed.

Article III, Section 2 of the U.S. Constitution confines federal courts to the decision of "Cases" or "Controversies." "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43,

67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). A case is rendered moot if "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1211 (10th Cir. 2005) (quoting *City of Erie v. Pap's A.M.,* 529 U.S. 277, 287 (2000)). "The crucial question is whether granting a present determination of the issues offered will have some effect in the real world." *Id.* at 1212 (internal quotation marks omitted).

Even when a case is not yet constitutionally moot, it may nevertheless be "prudentially" moot, and a reviewing court may properly decline to grant relief. A case becomes prudentially moot when "circumstances [have] changed since the beginning of litigation that forestall any occasion for meaningful relief." *Southern Utah Wilderness Alliance v. Smith,* 110 F.3d 724, 727 (10th Cir. 1997). A case is prudentially moot, for example, when the "government . . . has already changed or is in the process of changing its policies or where it appears that any repeat of the actions in question is otherwise highly unlikely." *Citizen Ctr. v. Gessler*, 770 F.3d 900, 909 (10th Cir. 2014) (citation omitted). When a reviewing court finds an appeal prudentially moot, it may dismiss the appeal. *See Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1215 (10th Cir. 2012).

Here, the primary issue on appeal is whether the district court abused its discretion when it stayed implementation of parts of the 2016 Rule while BLM's final review of the Revision Rule was pending. BLM is in the final stages of completing the

Revision Rule and anticipates publishing the final version in no more than three weeks. ECF No. 239-1 ¶ 5. When the final rule is published, this appeal will be constitutionally moot: the stay will no longer be in effect, and even if this Court remands to the district court with instructions to lift it, the superseded 2016 Rule will not spring back to life. *See Wyoming,* 414 F.3d at 1211-12 (addressing similar circumstances).

Because publication of the final Revision Rule is imminent, this case is presently prudentially moot. It makes little sense to decide the validity of a stay order that will soon cease to have any real world effect. *Winzler*, 681 F.3d at 1210 ("[I]f events so overtake a lawsuit that the anticipated benefits of a remedial decree no longer justify the trouble of deciding the case on the merits, equity may demand not decision but dismissal."); *see also Jordan v. Sosa*, 654 F.3d 1012, 1020 n.11 (10th Cir. 2011) (expressing frustration that parties' failure to inform court of developments mooting the appeal "resulted in the expenditure of significant judicial resources on issues that, in light of the current procedural posture of this case, are irrelevant").

No exception to mootness will apply once the final Revision Rule is published. Mootness might be excused, for example, when (1) the duration of the challenged conduct is too short to be fully litigated before it expires; and (2) there is a reasonable expectation that the complaining party will be subjected to the same conduct again. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990). But this exception for cases "capable of repetition yet evading review" applies only in "exceptional situations,"

and this is not such a situation. *Chihuahuan Grasslands All. v. Kempthorne*, 545 F.3d 884, 892 (10th Cir. 2008). First, the challenged stay was not too short to be litigated before it expires: when the court issued the stay, the Groups immediately appealed and moved for a stay pending appeal. When this Court denied that motion, the Groups could have moved—but chose not to move—for expedited review. *Disability Law Ctr. v. Millcreek Health Ctr.*, 428 F.3d 992, 997 (10th Cir. 2005) (explaining that when a party fears that its case "will become moot because events are moving too quickly, it can request expedited review").[2]

Nor is there a reasonable expectation that the Groups will be subjected to a similar stay in the future. The stay order at issue was narrowly tailored to address the unique circumstances of this case. When the Petitioners moved for relief, BLM anticipated finishing the Revision Rule within months. The court ultimately stayed both merits briefing and full implementation of the 2016 Rule to "provide certainty and stability for the regulatory community and the general public while BLM completes its rulemaking process"; to allow BLM to "focus its limited resources on completing the revision rulemaking"; and to "prevent the unrecoverable expenditure of millions of dollars in compliance costs." ECF No. 215 at 10-11. Now, BLM's final

[2] The voluntary cessation exception to mootness will not apply, either. *See Jordan*, 654 F.3d at 1037. BLM planned to publish a final Revision Rule long before the district court issued the stay, and the district court specified that the stay would end upon publication of the final rule. ECF No. 215 at 10-11.

Revision Rule is weeks from publication and the 2016 Rule will soon be superseded. When the appeal becomes constitutionally moot, the case should be remanded to the district court with instructions to dismiss. *Lewis*, 494 U.S. at 482. If the Groups take issue with any element of the Revision Rule, they may challenge it in a new proceeding, which will present a different factual and procedural framework. *See Or. Nat. Res. Council v. Grossarth*, 979 F.2d 1377, 1379 (9th Cir. 1992).

In sum, this Court may reasonably decline to spend scarce judicial resources crafting an order that will soon cease to have any real-world effect, and it should therefore dismiss this appeal as prudentially moot.

II. If this Court holds that the district court should have considered the traditional four factor test for injunctive relief, the proper course is to remand to the district court.

The time-limited nature of the district court's stay distinguished it from a classic preliminary injunction, which would last until a court issues a final decision. Here, by contrast, the court's order was closely tied to the fact that the Revision Rule was, at that time, scheduled to become final in a matter of months. The court explained that the operators would suffer irreparable harm if they must immediately comply with "significant provisions meant to be phased-in over time that will be eliminated in as few as four months," ECF No. 215 at 9-10; that there "is simply nothing to be gained by litigating the merits of a rule for which a substantive revision has been proposed and is expected to be completed within a period of months," *id.* at 10; and that a stay would provide certainty "while BLM completes its rulemaking

process," *id.* at 11. The court ultimately stayed both implementation of the full 2016 Rule and further litigation "until the BLM finalizes the Revision Rule." *Id.* at 10.

BLM recognizes, however, that when this Court denied the Petitioners' motions to dismiss this interlocutory appeal, it explained that the "district court's 'stay' effectively enjoins enforcement of the [2016] Rule" and held that 28 U.S.C. § 1292(a)(1) supplies appellate jurisdiction. June 4 Order at 5. Typically, before a court formally enjoins an agency action, it must consider (1) whether the movants have shown likely success on the merits; (2) whether the movants have established that they will suffer irreparable harm without relief; (3) whether the balance of equities tips in the movant's favor; and (4) whether the public interest favors granting injunctive relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *New Mexico Dep't of Game & Fish v. U.S. Dep't of Interior*, 854 F.3d 1236, 1246 (10th Cir. 2017).

If this Court holds that the district court was required to consider those four factors, then the proper course is to remand to the district court with instructions to consider the factors in the first instance. When an appellate court holds that a district court applied the improper standard, it should not "consider whether the result would be supportable on the facts . . . had the correct [standard] been applied." *Malat v. Riddell*, 383 U.S. 569, 572 (1966). And where, as here, "an issue has been raised, but not ruled on, proper judicial administration generally favors remand for the district court to examine the issue initially." *Pacific Frontier v. Pleasant Grove*, 414 F.3d 1221, 1238 (10th Cir. 2005); *see also Greystone Constr. v. Nat'l Fire & Marine Ins.*, 661 F.3d

1272, 1290 (10th Cir. 2011); *Evers v. Regents of Univ. of Colo.,* 509 F.3d 1304, 1310 (10th Cir. 2007); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1503 n.4 (10th Cir. 1995). Remand is particularly appropriate in this case because the "decision whether to grant or deny injunctive relief rests within the equitable discretion of the *district courts*." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 394 (2006) (emphasis added).

The Groups incorrectly assert that remand would be futile because the district court already considered the four factors when it denied the Petitioners' motions for injunctive relief in January 2017. Op. Br. at 25 n.12. But the Groups provide no support for the notion that interlocutory orders issued without the benefit of full merits briefing are set in stone. After all, "district courts generally remain free to reconsider their earlier interlocutory orders." *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1225 (10th Cir. 2007); *see* 18A Charles Alan Wright, et al., *Federal Practice and Procedure —Jurisdiction and Related Matters* § 4445 (2d ed.) (explaining that "even if the same matters arise again in a similar interlocutory setting, preclusion should be defeated if there is a reasonable prospect that a different preliminary showing can be made on the merits or on the balance of hardships").

To the extent that the district court's earlier evaluation of the Petitioners' likelihood of success on the merits was the law of the case, this Court has acknowledged that the law of the case doctrine "is a flexible one that allows courts to depart from erroneous prior rulings, as the underlying policy of the rule is one of efficiency, not restraint of judicial power." *Prairie Band Potawatomi Nation v. Wagnon*,

476 F.3d 818, 823 (10th Cir. 2007). When the district court denied the Petitioners' motions for a preliminary injunction more than 18 months ago, the case was at an early stage; indeed, the complete administrative record had not yet been lodged. The court also held that the Industry groups would not suffer likely irreparable harm because "many of the Rule's requirements . . . do not take effect for a year." ECF No. 92 at 25.

Now, however, the record is complete, the initial phase-in period has passed, and BLM anticipates publishing a final Revision Rule by the end of this month. This case will likely be constitutionally moot before the district court will have an opportunity to render judgment. If time remains, however, the district court should be given an opportunity to consider further briefing.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed as prudentially moot. If, however, this Court holds that the district court should have applied the four-factor test for injunctive relief, the case should be remanded to the district court with instructions to consider that test.

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General

ERIC GRANT
Deputy Assistant Attorney General

s/ Sommer H. Engels
ANDREW C. MERGEN
J. DAVID GUNTER II
SOMMER H. ENGELS
Attorneys
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 7415
Washington, D.C. 20044
(202) 353-7712
sommer.engels@usdoj.gov

Dated: September 12, 2018
90-1-18-14846

STATEMENT REGARDING ORAL ARGUMENT

BLM does not believe oral argument is necessary but would be pleased to appear should the Court so order.

CERTIFICATES OF COMPLIANCE, SERVICE, DIGITAL SUBMISSION, AND PRIVACY REDACTIONS

I hereby certify that on this 12th day of September, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit via the appellate CM/ECF system. The parties in this case will be served electronically by that system.

I certify that the foregoing document contains 3,792 words in 14-point type and that it complies with the type-face and type-volume requirements of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(a).

I also certify that I have scanned for viruses the PDF version of this document using our current version of Endpoint Protection (September 12, 2018) (v.1.275.1086.0), and that this document is free of viruses.

I further certify that I have not made any privacy redactions in this document and that this electronic submission is an exact copy of the hard copies submitted to the court in accordance with Fed. R. App. P. 32 and 10th Cir. R. 31.5.

s/ *Sommer H. Engels*
Sommer H. Engels

Counsel for the Federal Respondents-Appellees